

**U.S. House of Representatives**  
**Committee on the Judiciary**

Washington, DC 20515-6216  
One Hundred Eleventh Congress

April 20, 2009

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
Washington, D.C. 20530-0001

Dear Attorney General Holder,

I received your letter of April 17, 2009, that responds to my request for a copy of the memorandum issued this year by the Office of Legal Counsel (OLC) that reportedly<sup>1</sup> concludes that a statute to grant D.C. residents a full voting Member of Congress would be unconstitutional.

You state in your response that "We have substantial concerns about disclosing documents that would reveal the internal deliberations of the Department in reaching its final legal conclusions."

The Justice Department's concern is puzzling in light of the fact that the Department has publicly expressed its view that the above-referenced legislation is unconstitutional since the Kennedy Administration. Additionally, the Administration recently released OLC memos regarding interrogation tactics during a time of war. These memos deal with far more sensitive issues, yet the Justice Department was willing to release them. I do not see any reason for the same Department to now withhold memos regarding the constitutionality of the legislation in question.

I am writing, in the interest of comity, to refine my request. I am writing today to request a copy of the above-referenced OLC memo in a redacted form. This will allow the Administration to redact any deliberative elements of the memo, but still make public the ultimate legal conclusion regarding the constitutionality of a statutory proposal to grant D.C. residents a full voting Member in the House. While that may only constitute a single sentence of a much larger document, it is important for the Administration to be open and transparent about OLC's conclusion, especially in light of the fact that it is the office charged with reviewing all constitutional questions regarding legislation.

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<sup>1</sup> See Carrie Johnson, "A Split At Justice On D.C. Vote Bill: Holder Overrode Ruling That Measure Is Unconstitutional," *The Washington Post* (April 1, 2009).

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As I expressed in my previous letter, I remain concerned about reports that you decided to ignore OLC's conclusion regarding the constitutionality of this legislation and instead required attorneys in the Office of the Solicitor General to make a recommendation.<sup>2</sup>

The official web site of the Office of the Solicitor General states that "The Office of the Solicitor General is tasked to conduct all *litigation* on behalf of the United States in the Supreme Court, and to supervise the handling of *litigation* in the federal appellate courts."<sup>3</sup> In contrast, the official web site of OLC states that Office "is responsible for ... reviewing pending legislation for constitutionality."<sup>4</sup>

I believe the American people have a right to know OLC's ultimate legal conclusion regarding the constitutionality of pending legislation, especially if the Office rendered a decision on the constitutionality of pending legislation, and the Department acted on that decision in any way, including by referring the question of constitutionality to another office within the Department that is not "responsible for ... reviewing pending legislation for constitutionality."

The report in the *Washington Post* raises additional questions regarding the operations of the Justice Department. Consequently, I am requesting your response to the following questions, pursuant to the House Judiciary Committee's responsibility to oversee such operations.

Did you request an opinion from the Office of the Solicitor General regarding its ability to defend the above-referenced legislation in court after you received the decision of OLC regarding the constitutionality of such legislation? If so, did you seek the opinion of the Office of the Solicitor General because you were not satisfied that the opinion of OLC had adequately addressed all the relevant legal arguments regarding such pending legislation? If so, please advise me whether you no longer consider OLC to be "responsible for ... reviewing pending legislation for constitutionality," and whether any other office within the Department has assumed such responsibility. I ask these questions not to seek any inappropriate disclosure of substantive deliberations, but to better understand the operational structure of the Department.

The *Washington Post* has said that "Unfortunately, Mr. Holder's highly unusual solicitation of the solicitor general's office raises questions about what drove his actions.

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<sup>2</sup> Carrie Johnson, "A Split At Justice On D.C. Vote Bill: Holder Overrode Ruling That Measure Is Unconstitutional," *The Washington Post* (April 1, 2009).

<sup>3</sup> See <http://www.usdoj.gov/osg/> (emphasis added)

<sup>4</sup> See <http://www.usdoj.gov/olc/>.

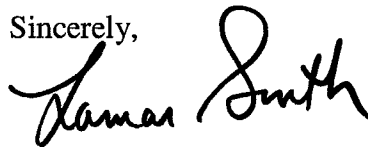
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To dispel any concerns, Mr. Holder should order the release of all memos from the two offices on this subject and make his own views public as well.”<sup>5</sup>

My request does not go nearly so far as that of the media. I hope that a more limited request can be accommodated quickly, in advance of any action the House of Representatives may take on the relevant legislation.

With appreciation for your prompt attention to this matter, I would request that you reply to this letter by Friday, May 1, 2009.

Sincerely,

A handwritten signature in black ink that reads "Lamar Smith". The signature is written in a cursive, flowing style.

Lamar Smith  
Ranking Member  
Committee on the Judiciary

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<sup>5</sup> “A Constitutional Question: Mr. Holder Muddies the Waters on D.C. Representation,” *The Washington Post* (editorial) (April 5, 2009) at A18.